

SERVICE DATE – SEPTEMBER 26, 2005

SURFACE TRANSPORTATION BOARD

STB Finance Docket No. 34738¹

PADUCAH & LOUISVILLE RAILWAY, INC.
– ACQUISITION –
CSX TRANSPORTATION, INC.

[REQUEST FOR WAIVER OF 49 CFR 1150.32(e)]

Decision No. 4

Decided: September 23, 2005

In its EVWR-2 petition filed August 31, 2005, in STB Finance Docket No. 34738 (Sub-No. 1), Evansville Western Railway, Inc. (EVWR) seeks a waiver of the posting requirement of 49 CFR 1150.32(e).² We think that, given the relevant circumstances, a waiver of this requirement would not be appropriate, and, therefore, we are denying the EVWR-2 petition.

BACKGROUND

In Decision No. 2 (served August 29, 2005, and published in the Federal Register on September 2, 2005, at 70 FR 52477), we accepted for consideration three pleadings filed August 3, 2005: the 49 U.S.C. 11324 primary application filed by Paducah & Louisville Railway, Inc. (P&L) and CSX Transportation, Inc. (CSXT) in STB Finance Docket No. 34738; the 49 CFR 1150.31 exemption notice filed by EVWR in STB Finance Docket No. 34738 (Sub-No. 1); and the 49 CFR 1180.2(d)(2) exemption notice filed by Four Rivers Transportation,

¹ This decision embraces: STB Finance Docket No. 34738 (Sub-No. 1), Evansville Western Railway, Inc. – Acquisition and Operation Exemption – Paducah & Louisville Railway, Inc.; and STB Finance Docket No. 34738 (Sub-No. 2), Four Rivers Transportation, Inc. and Paducah & Louisville Railway, Inc. – Continuance in Control Exemption – Evansville Western Railway, Inc.

² Under 49 CFR 1150.32(e), “If the projected annual revenue of the carrier to be created by a transaction under this exemption exceeds \$5 million, applicant must, at least 60 days before the exemption becomes effective, post a notice of intent to undertake the proposed transaction at the workplace of the employees on the affected line(s) and serve a copy of the notice on the national offices of the labor unions with employees on the affected line(s), setting forth the types and numbers of jobs expected to be available, the terms of employment and principles of employee selection, and the lines that are to be transferred, and certify to the Board that it has done so.”

Inc. (FRTI) and P&L in STB Finance Docket No. 34738 (Sub-No. 2). The primary application seeks Board approval for P&L's acquisition (by purchase of the track, ties, switches, and other track material, and by lease of the real property) of an approximately 124.5-mile CSXT line (the Evansville-Okawville Line or the Line) running between Evansville, IN, and Okawville, IL. The Sub-No. 1 filing seeks an exemption to permit EVWR to purchase (from P&L) the track, ties, switches, and other track material, to take assignment (from P&L) of the lease of the real property, and to operate the Line. The Sub-No. 2 filing seeks an exemption to permit P&L to continue in control of EVWR, and to permit FRTI to continue in control of P&L and EVWR, when EVWR becomes a rail carrier upon acquisition of the Line.³

In its EVWR-2 petition, EVWR seeks a waiver of the notice requirements of § 1150.32(e) as such requirements relate to the § 1150.31 exemption that EVWR seeks in the Sub-No. 1 docket. It should be noted, however, that § 1150.32(e) has two notice requirements – (1) posting the notice at the workplace and (2) serving the notice on the unions – and, although the EVWR-2 petition purports to seek a waiver of “the requirements” of the regulation, the petition in fact seeks a waiver of the posting requirement (and the certification requirement, insofar as it relates to the posting requirement) only. The waiver is justified, EVWR contends, “because strict compliance with the regulation creates certain technical issues and because all of the unions representing potentially-affected employees have been given ample notice of the transaction, including having been sent notice on August 3, nearly five months ahead of the requested closing date.”

DISCUSSION AND CONCLUSIONS

The purpose of the 49 CFR 1150.32(e) notice requirements is to ensure that railroad employees and railroad unions that would be affected by the transfer of a line are given sufficient notice of the transaction before consummation. The Board will waive these requirements in circumstances in which waiver will not thwart the purpose behind the requirements. See, e.g., Kansas & Oklahoma Railroad, Inc. – Acquisition Exemption – Rail Line of Union Pacific Railroad Company, STB Finance Docket No. 34746 (STB served Sept. 15, 2005) (granting a waiver of the similar notice requirements imposed by § 1150.42(e)).

Here, however, a waiver of the posting requirement might thwart the purpose behind that requirement. Although the pleadings filed in this proceeding on August 3rd by FRTI/P&L/EVWR and CSXT were served on the unions that represent workers on the Line, such pleadings were not served on the workers themselves. It is unclear whether the workers have actually received notice of the transactions contemplated by FRTI/P&L/EVWR and CSXT. Such notice may have been received from CSXT, or from the relevant unions, or perhaps from other sources, but it is not certain that the workers have actually received such notice. The § 1150.32(e) posting requirement is intended to make certain that workers receive required notice.

EVWR has made a number of arguments in support of its waiver request, but we are not persuaded by any of these arguments.

³ EVWR is a wholly owned subsidiary of P&L, which is itself a wholly owned subsidiary of FRTI.

(1) EVWR contends that technical compliance with the § 1150.32(e) posting requirement would be impracticable because P&L does not now have (and indeed will never have) employees who work on the Line and EVWR does not now have (although, if the transactions are approved, it will some day have) employees who work on the Line. These points are correct, but EVWR has not explained how they make technical compliance with the regulation impracticable. Indeed, we think that technical compliance with the § 1150.32(e) posting requirement is quite practicable: simply post the required notice at the workplace of the employees on the Line.

(2) EVWR contends that compliance with the § 1150.32(e) posting requirement would be meaningless because no P&L employees work on the Line. But this argument rests on EVWR's theory that § 1150.32(e) requires posting on the "seller's property," and that, as far as EVWR is concerned, its "seller" is P&L. The regulation, however, does not speak of the "seller's property." The regulation, rather, speaks of the "affected line(s)."

(3) EVWR contends that compliance with the § 1150.32(e) posting requirement is not necessary because the P&L Transaction for which approval is sought in the lead docket will be subject to the labor protective conditions in New York Dock Ry. – Control – Brooklyn Eastern Dist., 360 I.C.C. 60, 84-90 (1979). Even so, however, it seems likely that the transactions contemplated by FRTI/P&L/EVWR and CSXT may produce adverse effects for some workers. CSXT has projected that 31 employees (10 Trainmen, 7 Engineers, 11 Maintenance-of-Way workers, 2 Signal & Communications workers, and 1 Clerical worker) will be displaced, and 3 employees (2 Signal & Communications workers and 1 Clerical worker) will be relocated. And EVWR has indicated that it intends to hire 19 employees (5 Trainmen, 5 Engineers, 5 Maintenance-of-Way workers, 2 Signal & Communications workers, and 2 Mechanical workers). The New York Dock conditions can mitigate, but might not eliminate, the impact of the transactions contemplated by FRTI/P&L/EVWR and CSXT.

(4) EVWR contends that compliance with the § 1150.32(e) posting requirement may create significant confusion among CSXT's employees about the protections to which they are entitled. This seems unlikely. If the posted notice is accurate and comprehensive, it should not create confusion.

(5) Finally, EVWR contends that, because EVWR (as opposed to P&L, its corporate parent) has no contract with CSXT, EVWR may have no authority to enter CSXT's property to post notices there. It seems unlikely that CSXT would refuse to allow EVWR to post a notice that is necessary for the consummation of the transactions contemplated by FRTI/P&L/EVWR and CSXT. In any event, if CSXT were to refuse to allow EVWR to post the notice called for by § 1150.32(e), we would have ample authority to require CSXT to arrange for the posting of the notice.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The EVWR-2 request for a waiver of the posting requirement of 49 CFR 1150.32(e) is denied.
2. This decision is effective on its date of service.

By the Board, Chairman Nober, Vice Chairman Buttrey, and Commissioner Mulvey.

Vernon A. Williams
Secretary